No. 12,284

IN THE

United States Court of Appeals

For the Ninth Circuit

CECELIA J. WILSON,
Appellant,

vs.

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA, a corporation,
Appellee.

On Appeal from the United States District Court for the District of Idaho, Eastern Division.

Honorable Chase A. Clark, Judge.

BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

Texts

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JURISDICTION AND PLEADINGS.

This action was commenced by Cecelia J. Wilson, appellant, who filed her complaint (T. 2-3) in which it was alleged that she was a citizen and resident of the State of Idaho and that the defendant, a corporation, was incorporated under the laws of the State of Missouri and that the matter in controversy exceeded ex-

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(Note): All numerals and numbers contained herein refer to the page of the printed transcript of the record, prepared under the direction of the Clerk of the United States Circuit Court.

clusive of interest and costs, the sum of $3,000. This allegation was admited by answer (T. 6). The District Court had jurisdiction under Section 1291, Chapter 83, Title 28, U.S.C.A. The District Court having had jurisdiction to hear the matter, the Circuit Court has jurisdiction of the appeal and appellant gave notice of appeal (T. 21) pursuant to Rule 73 of the Federal Rules of Civil Procedure and filed bond on appeal. (T. 21-22.)

The appellant brought her action to recover upon a $5,000 accident policy issued to the deceased, Harry H. Wilson, her husband on the 21st day of August, 1937. The insured died on the 8th day of April, 1947. It was later determined and the Court found, Finding 11 (T. 15), that the policy was issued on the 24th day of August, 1937.

The appellee, by its answer and amendments thereto, admitted the issuance of the policy, denied that the deceased died through accidental means and denied the payment of premiums or compliance with the provisions of the policy by the insured, or the appellant and by separate and affirmative defenses alleged that the policy was a Missouri policy, became effective at Kansas City, Missouri and must be construed under the laws of that State and pleaded that the exceptions within the policy defeated recovery by the appellant, the surviving widow and that the deceased was operated on for hernia, a bodily infirmity, which contributed wholly or partly to his death and as an additional affirmative defense pleaded that notice of death and proof of loss was not furnished in accordance

with the terms of the policy. The answer is found T. 6-10.

The answer in paragraph II of the Third Defense (T. 9), pleads certain exceptions contained in the policy and in paragraph III, bases its defense upon the theory and proposition that the hernia was a bodily infirmity and that the operation for the same wholly or partly caused or contributed to the death of the insured and that for this reason it was within the exclusions or exceptions of the policy.

STATEMENT OF FACTS.

This case was tried at the same time as the case of New York Life Insurance Company, a corporation, Appellant, vs. Cecelia J. Wilson, Appellee, No. 12,227, in the United States Circuit Court of Appeals for the Ninth Circuit.

The medical or expert testimony in the two cases is identical. In the instant case additional testimony was introduced with reference to the payment of the premiums upon the policy and the notification of the company subsequent to the death of the deceased and the furnishing of proofs of loss.

The appellant presented her evidence through oral testimony, that is by witnesses, who testified in open Court before the trial judge and who were cross-examined by attorneys for appellee. The appellee submitted its proof with the exception of the witness, Dr. Graves (T. 148) by deposition. Seven physicians and

surgeons testified—three of them orally in the presence of the Court and four of them, who gave their depositions on behalf of appellee.

Harry H. Wilson died on the 8th day of April, 1947, the day following a hernia operation. Appellant sought to prove and did establish to the satisfaction of the trial Court, that his death was accidental and that the same was an accident. That he did not die as a result of the hernia operation or from any bodily infirmity, sickness or illness, but as a result of the unexpected and very unusual and extraordinary effect that certain sedatives administered to him had upon him or caused, and that the same could not have been foreseen by any capable physician and surgeon; that the result was tragic and not to be expected.

The Court rendered his opinion referring specifically to the facts in the case of *Wilson v. New York Life Insurance Company,* which opinion the Court adopted as his opinion in the instant case, except as to two additional questions. (T. 12.) The opinion in the case of *Wilson v. New York Life Insurance Company,* appears T. 11-18 in that case and is printed in full and appended to this brief.

Subsequent to the opinion of the Court, Findings of Fact and Conclusions of Law were prepared by attorney for appellee, which the Court did not consider in accordance with the decision, and on the 20th day of May, 1949 (T. 14), the Court directed that counsel for plaintiff and appellant, make certain amendments to the Findings of Fact and Conclusions

of Law, which the Court had directed counsel for plaintiff and appellant to prepare. These Findings of Fact and Conclusions of Law as prepared by attorney for appellant were accepted by the Court and on May 31, 1949 (T. 20), after objection by attorney for appellee or defendant, that he did not want it to appear that he prepared the Findings and Conclusions even though judgment was entered in the appellee's favor, the Court ordered, as shown by the minute entry (T. 20), that the Findings of Fact and Conclusions of Law were prepared under the direction of the Court.

The Court found specifically upon each and every allegation of the pleadings and the different defenses and all of the issues submitted. The Court made fifteen Findings of Fact. (T. 15-18.) The Court found, Finding III, that Harry H. Wilson died of accident or by accidental death on the 8th day of April, 1947.

And the Findings also set forth specifically that the deceased was in ordinary good health, that he had the services of a skilled physician and surgeon, a man of broad experience and who was competent and experienced. That he gave no indication that he was not in good physical condition and the proper subject of a simple hernia operation. We quote Finding VI:

> "That the patient appeared normal in every respect following said operation; did not suffer any shock and did not die as a result of said hernia operation." (T. 16.)

The Court also specifically found:

"VII. That the death of Harry H. Wilson was caused by choking or coughing or violent snoring or by choking, coughing and violent snoring which caused and resulted in an embolism causing the death of the insured."

"VIII. That the insured was given sedatives and opiates which caused the violent coughing, choking and snoring and which unexpectedly and accidentally caused the death of said insured."

"IX. That the coughing, choking and snoring of the patient was extremely violent, extraordinary and not to have been foreseen and entirely beyond the experience of his attending physician in previous and similar conditions."

"X. That the administration of opiates and sedatives was a reasonable and ordinary procedure to be followed by the attending physician; that the result thereof, causing the violent choking, snoring and coughing were tragical and out of proportion to the trivial cause and was an accident and resulted in death by accident."

"XI. That the opiates and sedatives administered to the insured prior to his death were externally administered."

"XII. That following the operation for hernia the opiates and sedatives were administered as medical treatment." (T. 16-17.)

These findings of the Court were necessary and of course the same findings as the findings made in the case of *Wilson v. New York Life Insurance Company.* The Court found by Finding XIV that the policy con-

tained certain provisions. (T. 17.) This finding, of course, was a mere copying of that portion of the accident policy that contained the exceptions that would prevent the beneficiary from recovering where the insured had taken out an accident policy.

The Court, after making and adopting his finding on all of the material issues and the facts, and finding that the plaintiff or appellant had sustained the burden of proof and proved the death by accident, then adopted conclusions of law in which the Court, for some reason, felt called upon to adopt a conclusion in accordance with his opinion (T. 13), wherein he said:

> "Regardless of how foolish it is to say that such an accident is sickness, that is the wording of the policy"

and adopted Conclusion No. V:

> "In this cause the court feels it necessary to follow the wording of the policy that medical treatment after a hernia operation is to be construed as sickness, solely because it is so stated in the policy and for that reason plaintiff is not entitled to recover." (T. 19.)

It will thus be seen that the Court did not find or conclude that the death of the deceased was:

> "caused wholly or partly or the results of which are contributed to by bodily or mental infirmity, hernia * * * or any * * * medical or surgical treatment therefore,"

but that he apparently did conclude that medical treatment was to be construed as sickness.

It is absolutely clear from the Court's opinion and from the conclusion of law V, as above quoted, that he concluded that regardless of the legal or general meaning of the word "sickness" that the insurance company could, without causing any ambiguity whatever, call the medical treatment, sickness, and this is the sole and only ground upon which he entered judgment for the appellee. The appellee has not filed any cross appeal or taken any exception to the record or called for any additional parts to be printed except its designatiton on (T. 188) referring to certain exhibits.

SPECIFICATION OF ERRORS.

I.

The Court erred in failing to recognize and apply the rule of law applicable, that the appellant having proven and established that the death of the insured was by accident, that the burden of proof shifted to the appellee to establish, by a preponderance of the evidence, that the accident was within the exceptions of the policy and the Court having concluded that the appellee was entitled to prevail, solely because of the reference to "sickness" in the exclusion, should have required the appellee to establish that the sickness existed and had affected the deceased prior to the time of the accident.

II.

The Court having found that the death was accidental and within the terms of the accident policy,

that it was caused by violent and external means, was bound to construe the policy most favorably to the beneficiary, which the Court failed to do.

III.

Taking into consideration the entire exclusion clauses and provisions of the insurance policy, the same clearly show an ambiguity and the word "sickness" in the policy is used and referred to in such a manner that it is not only ambiguous to the layman, but a reading and consideration of the Court decisions and authorities clearly show that it is ambiguous to the Courts and the trial Court erred in not resolving any doubt about the matter in favor of the appellant.

IV.

The Court erred in not giving to the language and provisions of the insurance policy the usual and ordinary construction of the same and erred in giving to the word "sickness", an unusual meaning and construction. That the word "sickness" has a well defined meaning generally and legally and that the giving of a sedative or the taking of a pill is not "sickness".

V.

That the Court having found that the death was purely accidental, tragical and out of proportion to the trivial cause, should have entered judgment for the appellant.

POINTS AND AUTHORITIES.

I.

The case is to be determined by the law of the State of Idaho.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 114 A.L.R. 1487.

II.

The death of the deceased was clearly accidental under the Idaho law as found by the Court.

Teeter et al. v. Dairymen's Coop. et al. (Ida.), 190 Pac. (2d) 687;

Rauert v. Loyal Protective Insurance Co. (Ida.), 106 Pac. (2d) 1015.

III.

The Idaho Courts have repeatedly held that insurance policies must be construed strongly against the insurer and in favor of the insured and that where there is any question as to the construction that can be given, the wording in the exclusions in a policy must be so construed as to permit recovery.

Jensma v. Sun Life Insurance Co., 64 Fed. (2d) 457;

Rauert v. Loyal Protective Ins. Co. (Ida.), 106 Pac. (2d) 1015;

O'Neill v. N.Y. Life Ins. Co. (Ida.), 152 Pac. (2d) 707;

Maryland Cas. Co. v. Boise Street Car Co. (Ida.), 11 Pac. (2d) 1090;

Kingsford v. Bus. Men's Assurance Co. (Ida.), 68 Pac. (2d) 58;

Sweaney & Smith et al. v. St. Paul Fire Ins. Co. (Ida.), 206 Pac. 178;

Watkins v. Fed. Life (Ida.), 29 Pac. (2d) 1007;

Stout v. Continental Life Ins. Co. (Ida.), 291 Pac. 1073;

Manufacturers Acc. Indem. Co. v. Dorgan, 58 Fed. 945;

Burr v. Com. Trav. Mut. Acc. Ass. Co. (N.Y.), 67 N.E. (2d) 248, 166 A.L.R. 762 (exhaustive note is found in the discussion of this question at page 473 of 166 A.L.R.);

Beile v. Trav. Prot. Ass. Co. (Mo.), 135 S.W. 497;

Buhl v. Kans. Life Ins. Co. (N. Mex.), 250 Pac. 635;

Sallie Newsom v. Commercial Cas. Ins. Co., 137 S.E. 456;

Int. Nat. Life Ass. v. Francis (Tex.), 23 S.W. (2d) 282;

Huntington Cab Co. v. Fed. & Cas. Co., Inc., 63 Fed. Supp. 939, citing 73 A.L.R. 414;

Georgia Casualty Co. v. Mills, 127 So. 555;

Sentinel Life Ins. Co. v. Blackmer, 77 Fed. (2d) 345, cert. denied, 80 L.Ed. 427;

Bankers Health & Acc. Co. of Am. v. Shadden, 15 S.W. (2d) 704;

Trav. Ins. Co. of Hartford v. Diner, 75 Fed. (2d) 3;

Meyer v. Fed. Cas. Co. (Ia.), 65 N.W. 328;

Browning v. Equitable Life Ass. Soc. of the United States (Utah), 72 Pac. (2d) 1060

(this case cited and approved by the Supreme Court of the State of Idaho in *Rauert v. Loyal Protective Assur. Co.,* supra).

(The Idaho Courts having so strongly and definitely held for liberal construction of all insurance policies for the benefit of the insured, any decisions from other Courts upon this phase of the matter are in point and competent authority in this case.)

IV.

The appellant having established that the death was by accident and the compliance with the general terms of the policy, the burden shifted to appellee to establish its defense and to prove the same by a preponderance of the evidence.

O'Neill v. N.Y. Life Insurance Co. (Ida.), 152 Pac. (2d) 707;

Browning v. Equitable Life Assurance Society of the United States (Utah), 80 Pac. (2d) 348.

V.

Where a policy provides in its exclusions that recovery cannot be had if death results wholly or partly, or directly or indirectly from, or is contributed to by bodily or mental infirmity, or sickness or disease, such provisions are construed by the Courts to mean infirmity, illness, disease or sickness existing prior to the accident and that would have caused the death without the accident and not infirmity or sickness that occurred subsequent thereto and that the fact of the existence

of some infirmity or illness or sickness, is not the contributing cause or does not contribute to the death unless it is the proximate cause, even though the accident accelerates such sickness or illness.

Browning v. Equitable Life Assurance Society of the United States, 72 Pac. (2d) 1060 (on rehearing, 80 Pac. (2d) 348 (Utah));

Silverstein v. Met. Life Insurance Co. (N.Y.), 173 N.E. 914;

Bohaker v. Travs. Ins. Co. (Mass.), 102 N.E. 342;

French v. Fidelity & Casualty Co. (Wisc.), 115 N.W. 869;

Carey v. Preferred Accident Ins. Co. of N. Y. (Wisc.), 106 N.W. 1055;

Ward v. Aetna Life Insurance Co. of Hartford (Neb.), 118 N.W. 70;

Nat. Benefit Ass'n v. Grauman (Ind.), 7 N.E. 233.

See Exhaustive Note, 108 *A.L.R.,* commencing at page 21.

VI.

Disease by the terms of the policy is synonymous with sickness.

Browning v. Equitable Life Ass. Society of the United States, 80 Pac. (2d) 348;

Logan v. Prov. Savings Life Ass. Soc. (W. Va.) 50 S.E. 529;

Cady v. Fid. & Cas. Co. (Wisc.), 113 N.W. 967.

VII.

The guide in cases of this character is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract.

Bird v. St. Paul Fire & Marine Ins. Co. (N.Y.), 120 N.E. 86;

Goldstein v. Standard Accident Insurance Co. (N.Y.), 140 N.E. 235;

Van Vechten v. American Eagle Fire Ins. Co. (N.Y.), 146 N.E. 432, 38 A.L.R. 1115.

VIII.

The Circuit Court of Appeals will, where the matter has been tried before the Court, and the conclusions of law are inconsistent with the findings, review the matter, and if the conclusions are inconsistent, order such judgment as is proper.

Jensma v. Sun Life Insurance Co., 64 Fed. (2d) 457.

ARGUMENT.

The appellant recognizes that if the Findings of Fact support or justify the conclusion of law complained of and if there is any finding or findings supported by evidence and the findings are not contradictory, that the Circuit Court will uphold the judgment of the trial Court.

The appellant's position is that the findings of fact do not justify the Court in concluding that the plaintiff was not entitled to recover and takes the position

that under the findings made by the Court, which, we take it, are binding and conclusive on this appeal, that the Court should have construed the policy strongly in favor of the insured in accordance with the settled rule of law in Idaho. And in accordance with this Court's decision in *Jensma v. Sun Life Insurance Company,* 64 Fed. (2d) 457, and the appellant feels that the *Jensma* case is strongly in her favor and that it clearly indicates that the Circuit Court will, under the existing conditions, consider this matter and right the mistake made by the trial judge.

The only basis upon which the appellee can possibly contend, under the Idaho law, that the Court's findings justify the judgment or the conclusion of law is that the following language is not in any way ambiguous or is not subject to more than one construction, namely:

> "Such hernia * * * medical or surgical treatment to be construed as sickness,"

and that such provision is clear and unambiguous to the average person or layman who secures insurance.

In order to determine whether the appellee can successfully so contend, it is necessary to construe and consider the entire part of the exceptions. The exceptions refer to death being caused wholly or partly or the results of which are contributed to by bodily or mental infirmity or hernia or any medical or surgical treatment therefor. This part of the exception or exceptions in the policy clearly does not prevent a recovery in this case and clearly does not say that the

insurer shall not be liable, if death, after an accident, should be the result of sickness. There is no dispute that an admitted accident could cause a sickness and that the company would be liable. It is the appellant's serious and sincere contention that that part of the exception which states that hernia, medical or surgical treatment is to be construed as sickness is ambiguous; that it does not in any way clarify the preceding exceptions and that the exceptions in the policy do not in any way make sickness an exception. The most that can be said for the last statement or sentence that is tacked on to the exceptions is that it is merely explanatory and attempts to define something as sickness that is not and was not sickness at all either from a legal standpoint or from any other standpoint.

To say that such a provision is clear and conclusive and is a direct exception, of course, is to say that such language means that if a man is treated for an accident or if he is treated for hernia, no matter what the accident is, that the treatment was sickness and that therefore he cannot recover.

If such reasoning can be sustained, then the insurer can provide that a broken leg is to be construed as sickness and then argue that one cannot recover for sickness even though it is not an exception of the policy and that this is clear and unambiguous.

Naturally, anyone purchasing an accident policy would expect that if he or his beneficiary were not to be compensated for the accidental breaking of a leg, that the insurer would say that recovery could not be

had in case of a broken leg and that they would not try to say in unusual and unexpected terms that a broken leg was to be considered sickness. This is merely "beating around the bush."

If in the present proceeding, sickness had been used as an exception it would have been placed with the exceptions and not in the explanatory matter and the policy could and should have provided that the beneficiary could not recover for death following any hernia operation.

That part of the policy which insures against accident which appears on the first page of the policy and is brought clearly to the attention of a policy holder provides:

> "The accident insurance under this policy covers all bodily injuries, fatal or otherwise * * *"

The provisions, conditions, limitations and exceptions in the policy are found upon a different page and different type and do not follow the policy statement that the policy "covers all bodily injuries, fatal or otherwise."

Counsel realizes that the exceptions are a part of the policy and that if they are absolutely clear and no ambiguity appears therein, and they are not subject to more than one construction and that they are clear and understandable, that they will be enforced.

Counsel is frankly at a loss and unable to reconcile the opinion in the case of *Wilson v. New York Life Insurance Company* with the opinion in the instant

case as handed down by the honorable and able district judge. We fail to see how in view of his first opinion or decision wherein he sets out that the first part of the policy gives and the latter part takes away and that Idaho will follow the humane and just rule in order to do justice in cases of this kind he could then base his conclusion of law upon what he refers to as something "foolish", and how, where the Court feels that it is "foolish" to call an accident, sickness, that he can say that an accident is sickness, when he finds that it wasn't sickness and when he finds directly that the death was not the result of any bodily infirmity or surgical treatment and that the death was effected solely through external, violent and accidental means as he found in the case of *Wilson v. New York Life Insurance Company.* A reading of the policy in that case discloses that while the insurer did not attempt to give a definition as to what disease or illness or sickness was, that the policy provides that there shall be no recovery if death is caused:

> "directly or indirectly from infirmity of mind or body, from illness or disease, * * *".

The Courts do not make any distinction between sickness and disease and if medical treatment after an operation, is to be construed as sickness, then certainly it should be construed as a disease, and surely an insurance company cannot give any foolish, unusual or unheard of meaning to a word in a policy to defeat recovery by the insured. If an insurance company can in such a subtle manner call something that

is not sickness at all, sickness, then they could define a hernia as a "bowel obstruction" or a broken bone as "pneumonia".

We urgently submit that if such an unusual thing as this may be done and is to be sanctioned by the Courts, then the definitions and the ordinary meanings and use of words is of no benefit or protection whatever, either to parties to contracts or to the Courts, but may become a trap.

We believe that the definition of sickness as found in Webster's International Dictionary must be fairly close to what, not only the layman, but the judiciary understands sickness to mean. Sickness is, without quoting the entire definition, generally considered as:

> "1. Affected with disease; ill; indisposed. Simon's wife's mother lay sick of a fever. Mark 1-30;
>
> 2. Affected with, or attended by nausea; inclined to vomit; as, sickness in the stomach; a sick headache;
>
> 3. Disordered; impaired; imperfect.
>
> Syn.: sick, ill, have been employed as in the best English usage with little distinction. There is at present a strong tendency in Great Britian to confine sickness to the sense of nauseated. See Disease."

It is urged on this appeal that to give to the word "sickness" or that to provide by an exception in the policy that the word "sickness" means something entirely different than any definition that can be found

for the word in any recognized legal or other dictionary, is in itself ambiguous, contradictory, likely to confuse and subject to more than one construction and that under the rule of law requiring a strong construction against the insurance company and requiring the policy to be construed most favorably toward the insured requires the Courts not to, as the honorable trial judge said, accept something that seems foolish, but to accept what is common sense and logical and that the matter must be construed most favorably to the appellant and that she is justly entitled, in view of the findings of fact adopted by the Court, to recover, and we urge that the findings of fact do not support the conclusion of law that accidental death, caused by the giving of sedatives through external means, is within the exception of the policy that it is sickness or that the policy in any way prescribes or sets out sickness as an exception under the circumstances of this case.

It is clear that the appellee has not shown and did not show that the death of the deceased was due to any bodily infirmity, either wholly or partly or directly or indirectly. The Court having found against the appellee on that theory and the appellee being bound in this particular case under the liberal construction rule by not only the Idaho cases but the case of *Browning v. The Equitable Life Assurance Society of the United States,* 72 Pac. (2d) 1060, and the same case on rehearing in 80 Pac. (2d) 349, any disease or infirmity existing in an insured where an accident follows and there is no cause or connection between

the injury or accident and the preexisting disease, the accident is considered as the sole cause.

In *Browning v. Equitable Life Assurance Society,* supra, the Court also held:

> "An existing disease does not mean a temporary disorder or derangement of the body organs, system, or functions, nor a tendency or susceptibility to disease, but a chronic or definite affliction such as would be embraced in the common understanding and meaning of the term 'diseased' or 'sick'."

The Court having specifically found that the hernia operation was not the cause of the death, it cannot be claimed that sickness referred to in the policy and in the Court's opinion and conclusions of law, referred to any sickness of the insured at the time of the operation. If the insured was sick or had any sickness, that sickness followed the violent coughing, choking and snoring and was a sickness that followed the accident. Snoring and coughing were unusual and unexpected and accidental and continued until they caused the death of the insured.

The giving of a sedative is not sickness. Who will say that taking an aspirin is sickness, and the sickness here, if there was such a thing, clearly developed as a result of the accident. We do not concede or believe that there ever was any sickness of the deceased, as that term is commonly used and understood, but if there was and if the insurance company can say that giving a man a sedative is a sickness, then the sickness could not have developed until after the sedative was

administered and the sedative having caused the unusual and unexpected violent reaction, the sickness followed the accident and the plaintiff or appellant can and should recover.

The appellee never thought or claimed that sickness caused the death of deceased. Their third defense, paragraph III (T-9), is:

> "That shortly prior to the death of Harry H. Wilson, he was operated on for hernia and that such bodily infirmity and operation wholly or partly caused or contributed to his death in such manner as to be within the exclusions of the said policy."

All of the appellee's medical testimony was directed to the proposition that if there had been no hernia there would have been no operation and if there had been no operation, there would not have been a death and their whole defense and testimony was directed to the proposition that the hernia was a bodily infirmity and that the operation at least partially contributed to the death of the deceased. None of the experts ever construed the matter as sickness, but the experts for the appellee contended that the death was foreseeable, to be expected and that it was the result of the hernia operation.

This is directly contradicted by the expert witnesses of the appellant.

Counsel for appellant appreciates that the burden is upon him and that it is his duty to reasonably and fairly analyze the decisions and to endeavor to aid and

assist the Court in arriving at a fair and just decision in this matter regardless of the outcome. However, counsel frankly admits that he is unable to understand many of the different distinctions drawn by the different Courts. Perhaps the Courts and other counsel may have the ability to do so, but it surely would not aid this Court to cite and refer to the literally hundreds of decisions concerning accident policies. The case surely will be decided upon what the Appellate Court understands to be the law of the State of Idaho and its decision in the case of *Jensma v. Sun Life Ins. Co.,* supra, construing the laws of the State of Idaho. The *Jensma* case has been cited and re-cited in many jurisdictions and by the Appellate Court, but we do not believe it would lessen the work of this Court or aid the Court to cite all of the cases approving the decision and we do not find the Appellate Court has in any way modified the decision in this case.

And when the members of a Court such as the Supreme Court of the State of Utah are so far apart upon the question of construction of a policy, very nearly identical with the policy in question, how can it be said that there is not an ambiguity in such policy and how can it be said that under the rule as laid down by the Supreme Court of the State of Idaho and under the laws of Idaho, that the ambiguity is not so marked and that the policy is not so susceptible to different constructions that it shall not be construed in the appellant's favor. In the *Browning* case in the original opinion, the chief justice concurred in the opinion. On rehearing he stated that because of the

violent difference in the thinking of the members of the Supreme Court, he thought a rehearing should be granted and dissented in the refusal of the majority to grant a rehearing.

In the instant case the burden was upon the defendant to prove that the exceptions defeated recovery. The *Browning* case has been approved by the Idaho Supreme Court and has been quoted from in different decisions. And this decision in the second opinion, 80 Pac. (2d) 348, sets out in clear and convincing language what burden is upon the plaintiff and what burden is upon the defendant.

The Court's attention is respectfully called to the fact that the accident policy in *Brown v. Equitable Life Ass. Society of the United States,* supra, contains almost the identical provisions of the present policy and we quote from the opinion on the rehearing:

> "Subdivision 'A' provides, inter alia, that 'disease', when used in the policy, means 'sickness'. In the opinion rendered, we discussed this question and held that 'disease' means a pre-existing disease and not a mere bodily condition, temporary disorder, or departure from normal, not amounting to a disease or sickness within the connotation of that term in common parlance."

One is not justified in saying that any two instruments are identical unless they have been compared word for word, or one is a copy. However, we believe that the provisions of the policy in the *Browning* case are so nearly identical with those in the instant case,

especially, insofar as the exceptions are concerned, that no distinction can be drawn between them.

And attention is called to page 351 of 80 Pac. (2d) (under the subdivisions 4 and 5 of the opinion). It will be found that the policy, among its exclusions, provides that it:

> "Shall not cover accident, injury, disability, death or other loss caused directly or indirectly, wholly or partially, by bodily or mental infirmity, hernia, * * * or by any other kind of disease",

and then defines "disease" as meaning "sickness" as above quoted.

This same Court on rehearing, in referring to its rule of construction referred to *Warwick v. Knights of Damon* (Ga.) 32 S.E., 951 and quoted as follows:

> "And especially is this rule of construction to be adhered to and applied in cases where the insured has prima facie established a right to recover under the terms of the policy, and the company is seeking to defeat such a liability by showing that the act complained of is within one of the exceptions reserved in the contract as a defense to an action on the policy. All such exceptions are to be construed strictly against the company, and liberally in favor of the insured."

In the original opinion in 72 Pac. (2d) 1075, the Court in quoting from 38 A.L.R. 1115 supra said:

> "A policy of insurance is not accepted with the thought that its coverage is to be restricted to an Appolo or a Hercules."

Quite a strong argument can be and is repeatedly made in this type of case, that there is really no such thing as accident and in a sense, this is true. In one way of approaching the matter it can be reasoned that death being inevitable, it is not an accident; that it follows naturally from some cause that was set in motion that could have been avoided by the use of proper care or by proper foresight. However, if this were the law, then there could be no such thing as an accident policy and if accident policies are to be written, then they must be written to cover those things that are unusual and unexpected happenings and that come within the ordinary meaning of the word "accident".

The Court in the *Browning* case, 72 Pac. (2d), at page 1075, in discussing things that could be sickness or infirmities or that might contribute to death, said:

> "All of us, at all times, probably have in our systems microbes, germs, and bacteria of many diseases—pneumococcus, streptococcus, staphylococcus, tuberculosis, and influenza bacillus, ad infinitum—but which in the normal course of our lives we may successfully ward off. Because in warding off such possible diseases we may be in a weakened condition of strength and resistance, we may the more readily succumb to an injury accidentally sustained by external violence. The injury, not the presence of the disease germs in the system, would still be the cause of death or disability."

I have just completed a very careful reading of the testimony of Doctors Graves, Beeman, Swindell, Pit-

tenger and Stewart. We find that the word "sickness" is not used or employed by either counsel examining them or by the witnesses. Disease is only referred to in connection with the venous system and that sparingly. This testimony is found T. 148-183. Each of these witnesses did not believe or diagnose the cause of death as pulmonary embolism and each of these witnesses were unable to tell the cause of death without an autopsy.

They testified that the hernia was a contributing cause to the death, which was purely a conclusion upon their part, under questions directed to them and the question of whether or not the hernia was such a contributing cause as barred recovery under the policy, is both a question of law and of fact that was determined adversely to the conclusion of these expert witnesses. The appellee's expert witnesses did not pretend to indicate or to say what "sickness" was or to try and show that either "illness" or "disease" in any way contributed to the death of Harry H. Wilson.

Dr. Brothers was the only witness who testified concerning whether or not bodily infirmity was a disease:

> "Q. And every one of those go back to a bodily infirmity?
>
> A. Injuries and prior operations you did not call them diseases."

It will be observed that the expert witnesses for the appellee take the position that the deceased did not die of pulmonary embolism and at the same time state

the pulmonary embolism is to be expected and that it was to be foreseen. The testimony of the different experts for the appellee are not in accord—some of the experts testifying that there would be more likelihood of a post operative death from embolism in a man 61 years of age than in a younger person, yet Dr. Stewart testified:

> "Q. Assuming that Mr. Wilson was 61 years of age at the time of his death, what would you say as to whether post operative pulmonary embolism would be more probable in his case than that of a younger person?
>
> A. No, I do not think so, because it occurs at all ages."

We quote this testimony for the purpose of showing that there is so much diversity of opinion among the witnesses and in the authorities that under the Idaho rule of law, the Federal Courts cannot consistently do other than construe these matters in favor of the appellant.

It is most respectfully urged that this cause should be reversed and judgment entered for the appellant.

Dated, Pocatello, Idaho,
September 26, 1949.

Respectfully submitted,
B. W. Davis,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

In the United States District Court, District of Idaho
Eastern Division

Cecelia J. Wilson, Plaintiff, vs. New York Life Insurance Company (a corporation of New York), Defendant.	No. 1463 February 2, 1949

Opinion

Ben. W. Davis, Esq., of Pocatello, Idaho,
Attorney for the Plaintiff,

A. L. Merrill, Esq., Pocatello, Idaho,
J. L. Eberle, Esq., Boise, Idaho,
Attorneys for the Defendant.

CLARK, District Judge.

The Plaintiff Cecelia J. Wilson brought this action to recover for the alleged accidental death of her husband, Harry Wilson.

Harry Wilson, the deceased, was a resident of the State of Idaho at the time the defendant New York Life Insurance Company, a corporation of New York, on or about the 19th day of May, 1828, issued its certain policy of insurance, being policy No. 10255251, the policy insuring the insured for $5,000.00 payable

to his beneficiary upon proof of his death and $10,000.00 or double the face of the policy if death resulted from accident. This action is for the recovery of the double indemnity of $5,000.00 for the alleged accidental death.

The policy provided for double indemnity if "the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means * * *". "Double indemnity shall not be payable if the insured's death resulted * * * directly or indirectly from illness or diseases or from any bacterial infection other than bacterial infection occurring in consequence of accidental and external bodily injury * * *"

The insured died on the 8th day of April, 1947, from "acute pulmonary embolism". This is defined at page 12 of the transcript of the testimony, by Doctor O. F. Call, attending physician at the time of Mr. Wilson's death, as a "foreign substance or piece of a clot flowing in the blood stream which goes through the heart, through the pulmonary artery to such a place that it can't go any farther and lodges in the pulmonary artery or branch of it. It can be a clot of blood, a fatty or foreign substance."

The circumstances preceding Mr. Wilson's death as disclosed by the evidence, are as follows: He was in ordinary good health of the average man; he was about sixty years of age; he was troubled to some extent by high blood pressure. He had undergone an operation some years ago for a bowel obstruction; the record does not disclose when this operation was per-

formed but it was prior to an operation for hernia that was performed some four years prior to his death. On the morning of April 7, 1947, he was again operated upon for recurrent inguinal hernia. Immediately following the operation he was returned to his room in the hospital in apparently good condition. After the operation on the morning of April 7, opiates and sedatives were administered, which were a part of standard and recognized treatment. The opiates so administered caused deep heavy snoring, choking and coughing and although Mr. Wilson was a heavy snorer when sleeping under natural conditions, this medication caused the choking and coughing and snoring to become more violent, causing the pulmonary embolism from which death resulted at 5 o'clock A.M., April 8, 1947, about twenty hours after the operation. The result of the administration of the opiates was entirely unforeseen and unexpected; there was nothing to indicate, at the time of their administration, that he would develop this extraordinary condition snoring or heavy breathing and the coughing and choking causing the embolism. Doctor Call testified that in his experience in operations this condition that developed in reference to the snoring, choking and breathing was most extraordinary and not to be expected or foreseen; the record discloses the following questions and answers in the testimony of Doctor Call:

Q. I call your attention to the definition in Webster's International Dictionary of accident; that defines an accident as "a befalling; an event that takes place without one's foresight or expectation, an undesigned, sudden and unexpected event; chance; con-

tingency, often an undesigned and unforeseen occurrence of an afflictive or unfortunate character, a casualty, a mishap, as, to die of accident." Now, Doctor, I will ask you if the event of the patient's death under the circumstances, in your opinion, was an event that took place without foresight and expectation?

A. It was.

Q. Was it undesigned, sudden and unexpected?

A. It was.

Q. Was it a chance?

A. It was.

Q. Due to contingency?

A. It was.

Q. Was it an undesigned and unforeseen occurrence of an afflictive or unfortunate character?

A. It was.

Q. Was it a casualty?

A. It was.

Q. Was it a mishap?

A. It was.

Q. Did he die in your opinion, by accident?

A. He did.

Q. Now, with reference to this condition, this unexpected condition that occurred there with reference to the choking and snoring, was that an event that took place without foresight and expectation?

A. That's right.

Q. Was it undesigned?

A. It was.

Q. Was it a chance?

A. It was.

Q. A contingency?

A. Yes sir.

Q. Was it an unforeseen and undesigned occurrence of an afflictive or unfortunate character?

A. It was.

Q. And was it a mishap?

A. Yes sir, certainly.

Q. In your opinion it was the direct cause of the man's death. The main cause, and the principal and moving cause of the man's death?

A. Yes sir.

The deceased died unexpectedly, there was nothing in his operation, and he gave no indicative history or evidence that the calamity that befell him was likely to happen.

Plaintiff having established the death was accidental the burden shifts to the defendant and it must allege and prove that recovery is barred by the limitations qualifying the general clause hereinbefore set forth.

"Where the insurer seeks to avoid liability by reason of an alleged breach of the condition of the policy, the burden rests upon it to show such breach; and, where it seeks to avoid liability on the ground that the accident or injury is within one of the exceptions in the policy, the burden rests upon it to prove facts bringing the case within the exception." *O'Neil v. New York Life Insurance Co.,* 152 Pac. (2d) 707 at page 711.

In meeting this burden it must be remembered that the limitation clause is to be construed most favorable

to the insured. The rule is that insurance policies must be construed strongly against the insurer and in favor of the insured and that where there are two constructions that may be placed upon the meaning of an accident policy, one of which will permit the insured to recover and the other not permitting such recovery that the policy must be construed so as to permit recovery. The most widely cited rule is the one set forth by Ex-president and Former Chief Justice Taft (Court of Appeals 6th Circuit), in the case of *Manufacturer's Accident Indemnity Co. v. Dorgan,* 58 Fed. 945, he said: "It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the Courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which Courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer." This statement has been cited with approval by the Court of Appeals of this, the Ninth Circuit in the case of *Jensma v. Sun Life Assurance Co., of Canada et al.,* 64 Fed. (2d) page 457.

Recovery in this case depends on the limitation in the policy hereinbefore set forth. The term *Accidental means* in some jurisdictions has been held to clearly limit the policy's meaning to cause alone, however the better rule and the rule followed in this jurisdiction is

that the term "accidental means" and the term "accidental results" and "accidental death" are regarded as legally synonymous. *Jensma v. Sun Life Assurance Co., of Canada et al.,* supra. *Ranert v. Loyal Protective Insurance Co.* (1940) 61 Idaho 677, 106 Pac. (2d) 1015; *O'Neil v. New York Life Insurance Co.,* supra.

We have here a result that was unforeseen, the opiates were introduced into the body of the insured without any thought that such a result would follow, the result being unforeseen and wholly unexpected and unanticipated.

Death is inevitable, every wan lives more happily and secure if he feels that he has insurance to take care of those who are near and dear to him, after he has departed this life. It is well known, as suggested in the case of *Ranert v. Loyal Protective Insurance Co.,* supra, that the ordinary man is not versed in the construction of contracts. He simply says to the life insurance agent, "I want this security for my family" he does not prepare, nor does he have his lawyer prepare the written contract; he pays the money for this insurance. The contract is prepared beforehand by the insurer. I think it can be said without contradiction that the provisions of the policy are not discussed, they simply tell the agent the protection they desire. The policy is all written out in printed form and following the main provisions of the policy the limitations are provided. In other words, the first part of the policy gives and the second part of the policy takes away, and the ordinary person who is not trained

to interpret contracts is generally not in a position to understand the details, terms and meanings of the limitations. In fact, as is so often said, the insured seldom sees the policy until it has been issued and delivered to him and then after he receives it he puts it in his desk or safe and the first time it is read is by his beneficiaries after his death. Many of its terms and all of its defenses and super limitations are difficult to understand. If justice is to be done the Courts must adopt a rule of construction in favor of the insured to accomplish the purpose for which the insurance was taken out and for which the premiums were paid.

This Court follows that rule not only because it is the rule in this jurisdiction but because it is the just rule.

The Court is of the opinion that the defendant has failed to bring itself within the exception relied upon to defeat recovery and is further of the opinion that the result that followed the administration of the opiates was not natural or probable and should not reasonably have happened and under all the circumstances the result was tragically out of proportion to the trivial cause, and that the plaintiff is entitled to recover under the terms of the policy.

The plaintiff's counsel may prepare the necessary findings, conclusions and judgment to conform with this opinion, copy will be served on counsel for the defendant and the original presented to the Court for approval.